IN THE SUPREME COURT

OF THE UNITED STATES

NO. 76-6767

FRANK R. SCOTT AND BERNIS L. THURMAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Michael E. Geltner
Attorney for Petitioner Thurmon
Georgetown University Law Center
Appellate Litigation Clinic
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Tele: (202) 624-8297

John A. Shorter, Esq.
Attorney for Petitioner Scott
508 Fifth Street, N.W.
Washington, D.C. 20001
Tele: (202) 638-4040

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

INTRODUCTION

Petitioners Scott and Thurmon respectfully request the Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia to review that court's judgment affirming their convictions for conspiracy to sell narcotic drugs in violation of 26 U.S.C. §§4705(a and 7237(b) (Thurmon) and possession of narcotic drugs in violation of 26 U.S.C. §4704 (Scott) and its interlocutory decisions reversing the trial judge's orders suppressing evidence obtained pursuant to wiretaps.

OPINIONS BELOW

Prior to trial, District Judge Waddy entered an order suppressing wiretap evidence for failure to minimize interception of non-crime related telephone calls. The opinion is reported at 331 F. Supp. 233 (D.D.C. 1971) and attached as Appendix A. The Government's appeal from that order resulted in a reversal and remand to Judge Waddy to consider additional evidence in light of the standards announced in United States vs. James, 161 U.S. App. D.C. 88, 494 F.2nd 1007 (1974). The court of appeals' first remand opinion, which we will refer to as Scott I, is reported at 164 U.S. App. D.C. 125, 504 F.2nd 194 (1974) and attached as Appendix B.

On remand, Judge Waddy filed a new order finding facts, reaching conclusions of law and again suppressing the wiretap evidence. That order is unreported and is attached as Appendix C. The court of appeals' opinion reversing Judge Waddy a second time, which we will refer to as Scott II, is reported at 170 U. S. App. D.C. 158, 516 F.2nd 751 (1975) and attached as Appendix D. A timely suggestion for rehearing en banc resulted in its denial with four judges voting to grant rehearing en banc. Their statement, by Judge Robinson, is reported at 173 U.S. App. D.C. 118, 522 F.2nd 1333 (1976) and is attached as Appendix E.

On the same date, Judges Wright, Robinson and Merhige filed a memorandum affirming in the related case of United States vs. Walker, 173 U.S. App. D.C. 129, 522 F.2nd 1344 (1976) expressing the view that 18 U.S.C. §2518(5) was violated in this case and Walker. That memorandum is attached as Appendix F.

A petition for a writ of certiorari to review the Scott II decision was denied at 425 U.S. 917, with Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Powell dissenting. The order and dissenting opinion are attached as Appendix G.

After this Court's denial of certiorari, the case returned to the district court and, after speedy trial dismissal motions were denied, resulted in the conviction of petitioners and a third defendant, Chloe Daviage.[1/] No opinion was filed. The court of appeals' opinion affirming the convictions of Petitioners and Daviage, sub nom United States vs. Daviage, is unreported and attached as Appendix H.

JURISDICTION

This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari under 28 U.S.C. §1254(1). The court of appeals' judgment was entered March 29, 1977, and Petitioners' timely application resulted in Mr. Chief Justice Burger's entering an order on April 21, 1977 extending to May 28, 1977 the time for filing this petition.

1/ Daviage's petition for a writ of certiorari has already been filed and bears No. 76-6637.

QUESTIONS PRESENTED

I. (a) Whether the conduct of federal narcotics agents, in executing wiretaps under a court order which required minimization pursuant to 18 U.S.C. §2518(5), may, consistent with the deterrent basis of the exclusionary rule, retroactively be determined reasonable by a court, despite the fact that at the time of the interceptions the agents admittedly made no good faith efforts to determine whether minimization of the wiretap intrusion was feasible, willfully failed to attempt minimization, and instead intercepted each and every call.

(b) Whether, in view of a bad faith violation of wiretap minimization requirements, exclusion of only those conversations which are of a non-incriminating nature is consistent with the deterrent basis of the exclusionary rule and with Congressional intent in enacting the statutory suppression remedy to Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

II. Whether federal agents executing a wiretap authorization violate the Fourth Amendment rights of persons whose communications they intercept, when they intercept all calls on the authorized line despite the fact that they did not have probable cause to believe that all calls contained evidence of criminal activity, did not assert that they had such probable cause to the judge, and were not authorized to so intercept by the judge.

III Whether criminal defendants whose trial was delayed for six years, four months and twenty-two days from date of arrest were denied a speedy trial, in violation of the Sixth Amendment to the United States Constitution, when the bulk of the time elapsed between arrest and trial was due to unnecessary delay in processing and deciding Government interlocutory appeals from wiretap suppression orders and the defendants could not have had an earlier trial except by waiving their highly colorable challenges to the wiretaps.

PROVISIONS OF LAW INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. §2518(5):

(5) . . . Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

18 U.S.C. §2518(10) (a):

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that--

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted in insufficient on its face; or

(iii) the interception was not made in conformity with the order authorization or approval.

STATEMENT OF THE CASE

In the course of an investigation of what was believed to be a substantial narcotics operation[2/], the Government on January 24, 1970, applied to District Judge Smith for an order to wiretap telephone number 483-2948, registered to Geneva Jenkins and located in a residence at #603, 1425 N Street, Northwest, Washington, D.C. The Government's affidavit alleged probable cause to believe that Alphonso H. Lee, Thurmon, and others were committing narcotics offenses, and were using telephone number 483-2948 in connection with such offenses, and that information concerning the offenses would be obtained through a wiretap of the communications over that telephone. The order also contained the provision required by 18 U.S.C. §2518(5) that the interception "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter". Subsequently, the Government applied for and received similar authorization for two other wiretaps, on telephones located at the residence of Alphonso Lee.

The agents conducting the wiretaps listened to and recorded each and every call over the telephones; the agent in charge of the interception testified that they made no attempt to minimize the interception, even though they knew of the minimization requirement of the court order and the statute. The agents themselves classified the intercepted calls as only 40% narcotic related with the remaining 60% as non-narcotic related calls.

On February 24, 1970, the wiretaps were terminated and arrest and search warrants were issued. Several persons, including petitioners, were arrested and a quantity of narcotics were seized. Indictments were not filed until June 24, 1970, when two multi-count indictments were filed charging Scott, Thurmon and others with drug offenses. District Judge Waddy held hearings in April, 1971 on several pre-trial motions including one to suppress all wiretap evidence on the ground that the monitoring agents failed to minimize the instrusion as required by the order of the court and by statute. On April 29, 1971 Judge Waddy granted the motion to suppress for lack of minimization, stating that the agents in charge of the interceptions "did not even attempt 'lip service compliance' with the provision of the order and statutory mandate but rather completely disregarded it."

The Government after unsuccessfully moving for reconsideration based on a "call analysis", appealed on July 23, 1971. The court of appeals did not hear agrument until December 13, 1972 - almost one and a half years later - and then decided to hold decision in abeyance until its decision in the then-pending case of United States vs. James, 494 F.2nd 1007 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974), which also presented the minimization issue to that court. After its decision in James, in which it adopted the language of United States vs. Tortorello, 480 F.2nd 764, 784 (2nd Cir. 1973), cert denied, 414 U.S. 866 (1973), that minimization was satisfied if agents made good faith efforts to minimize and if those efforts were reasonable, the court of appeals remanded Scott I to Judge Waddy on June 27, 1974 with instructions to accept any evidence which would be of assistance in assessing the reasonableness of the agents' conduct in light of James, including, if the District Court was convinced of its validity, the call analysis prepared by Government attorneys.

On remand Judge Waddy held further hearings on the minimization issue and the reasonableness of the agents' conduct. Judge Waddy rejected the call analysis as an after-the-fact attempt to validate the interceptions and in conflict with what the agents thought at the time of the interceptions.

Viewing the totality of the agents' conduct, Judge Waddy found a "knowing and purposeful failure to comply with or even attempt to comply with the minimization requirements" and, on

---

2/ Judge Waddy found that the intercept revealed an operation of lesser dimension than originally anticipated.

November 8, 1974 again ordered all wiretap evidence suppressed.

The Government appealed. A panel of the court of appeals consisting of Judges MacKinnon, Wilkey and District Judge Jameson reversed on July 25, 1975, concluding that the search and seizure was not unreasonable since, by looking at the intercepted conversations, it could not discover any categories of calls which could not have been reasonably intercepted had minimization been instituted. The court rejected the argument that such retroactive validation is contrary to Fourth Amendment law by finding that rule inapplicable to minimization requirements of a wiretapping statute.

Since the agents were not required to institute minimization procedures, the court found that their bad faith in not doing so was irrelevant, stating that the "agents could publicly declare their intent to disobey the minimization provisions of the wiretap order, and yet it is possible that the ultimate interceptions will be found to have been reasonable."

The Court of Appeals did not have to reach the question of the extent of suppression required to cure a violation of minization requirements because it found none, but added that, even if it found a violation of minimization requirements, total suppression probably would not be required, since Congressional intent was to allow use of all evidence of an incriminating nature. "The nonincriminating evidence could be suppressed," but any evidence falling under the wiretap order or under §2517(5) would be admissible. The only remedy available against the illegal conduct of the agents would be a civil suit under §2520.

Petitioners' petition for rehearing with suggestion for en banc consideration was denied by the Court of Appeals. Judge Robinson filed a statement joined in by Chief Judge Bazelon and Judge Wright and Leventhal expressing their views as to why full court consideration should have been granted (App. E)[3/].

3/ See also, Memorandum, United States vs. Walker, App. F.

Petitioners filed a timely petition for a writ of certiorari to this Court, but after a delay in receiving the Government's opposition this Court denied certiorari on April 5, 1977, with three members of the Court dissenting. Appendix G.

After the mandate returned to the district court, petitioners moved to dismiss on speedy trial grounds. Judge Waddy held hearings on July 6, 1977 and denied the motions, finding that Scott and Thurmon had timely asserted their rights but that they had not been prejudiced by the delay.

On July 15, 1977, Scott, Thurmon and Daviage waived trial by jury and went to trial on a stipulation based on the wiretap evidence and its fruits. There was no defense evidence. Judge Waddy found Scott guilty on count 13 of the Scott indictment (Cr. No. 1088-70) and Thurmon guilty on count 1 of the Thurmon indictment (Cr. No. 1089-70) and, thereafter, sentenced both to ten years imprisonment.

Scott and Thurmon appealed to the court of appeals, preserving their minimization claims and raising, for the first time in that court, the speedy trial claim. A panel of the court of appeals affirmed, concluding that, as in Barker vs. Wingo, 407 U.S. 514 (1972), there was absence of prejudice and freedom from incarceration and "something less than vigorous assertion by appellants of their speedy trial rights and the attribution of the most substantial part of the delay to the interlocutory appeals." Appendix H.

REASONS FOR GRANTING THE WRIT

I. WIRETAP ISSUES

We cannot improve on the reasons why certiorari should be granted set forth by Mr. Justice Brennan in his dissenting opinion, Appendix G, and those in Judge Robinson's statement for the four members of the court of appeals who sought rehearing en banc, Appendix E. We should note that the Government's primary ground for opposing the writ of certiorari when review was sought from the Scott II decision was that the case was at an

interlocutory stage and "review now by this Court is premature, since at trial petitioners may be acquitted, in which case their claims will be moot." Brief for the United States in opposition p.6-7, Scott, et al. vs. United States, No. 75-5688 (filed February 17, 1976).

Since its denial of certiorari in this case, the Court has considered only one wiretap case on the merits - United States vs. Donovan, 97 S.Ct. 658 (1977). Although not in point to the minimization issues raised here, that portion of the Court's Donovan opinion rejecting suppression suggests disagreement with that portion of the court of appeals' Scott II opinion rejecting total suppression, because it suggests suppression 18 U.S.C. §2518(10)(a)(i) when the violation involves a central provision of Title III protections such as the minimization requirement. 97 S.Ct. at 670-671.

II SPEEDY TRIAL ISSUES

The court of appeals' resolution of the speedy trial issues seems to turn on its view that the delays in resolving the Government interlocutory appeals were justified. The record belies this conclusion; even accepting the view that it was proper to wait after argument for the decision in United States vs. James, supra, the record demonstrates almost one and one half years between appeal and argument and an additional period of over one year due to slow processing by the Government, starting from the delay in indictment. The delay involved in Government interlocutory appeal has attracted substantial attention. See e.g., United States vs. Brown, 520 F.2nd 1106 (D.C. Cir. 1975); United States vs. Sarvis, 523 F.2nd 1177(1975); United States vs. Perry, 353 F. Supp. 1235 (D.D.C. 1973). This case presents an appropriate vehicle for the Court to consider whether delayed decisions must be counted against the Government for speedy trial purposes.

Moreover, the Court's conclusion that there was no timely assertion of speedy trial rights is improper. The only way Petitioners could have had a trial before April, 1976 was by waiving their right to assert their highly colorable claims under 18 U.S.C. §2518(5). The timely assertion portion of the Barker test cannot require futile motions to be filed or that colorable pre-trial suppression motions be withdrawn to preserve speedy trial rights.

CONCLUSION

The writ of certiorari should be granted.

Respectfully Submitted,

Michael E. Geltner
Attorney for Petitioner Thurmon
Georgetown University Law Center
Appellate Litigation Clinic
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Tele: (202) 624-8297

John A. Shorter, Esq.
Attorney for Petitioner Scott
508 Fifth Street, N.W.
Washington, D.C. 20001
Tele: (202) 638-4040

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached writ of certiorari was mailed to the Solicitor General, Department of Justice, Washington, D.C. on May 19th, 1977.

Michael E. Geltner

John A. Shorter, Esq.